APPENDIX A

Argument on Fraud Charges in Procurement of Federal Judgment.

The appeal of Mrs. Cleveland from the Federal judgment of February 7, 1939—before the Circuit Court of Appeals at Cincinnati was argued in February, 1941.

Mr. O'Keefe, counsel for the Trustee, stated positively and solemnly to the Court of Appeals that since the audits of June, 1938, the corpus of the Ninth Paragraph Trust had made up its losses and that then (at the time of his oral argument in February, 1941) Mrs Cleveland's one-sixth share was worth as much or more than the appraised value of $616,000 at Mr. Eddy's death in 1925.

There appears to be no other reason why the Court of Appeals should have almost immediately after the oral arguments affirmed the lower Court's judgment without opinion. See 117 Fed. (2d) 1009.

The Cleveland Bill so charged (page 280 of Pleading A) and the Trustee's motion to dismiss in the case at bar, so admitted.

General Discussion of Fraud Charges—

The Cleveland Bill of Complaint in the second suit charged fraud, as follows:

1st—False statements of value to the Court of Appeals on (a) oral arguments, and (b) in its answer to petition for rehearing. It was positively asserted that the remainderman's one-sixth interest under the will was in February, 1941 (at the time of submission of the appeal from Judge Tuttle's judgment) actually worth as much

or more than its appraised value of $616,000 in April, 1925, at testator's death.

It was asserted to the Appellate Court in order to obtain an affirmance of the judgment—that at the time of the oral argument, the losses of $124,500 shown in the audits of June, 1938, had been made up and the trust estate consequently had lost nothing.

These false representations by the Trustee are admitted by its motion to dismiss, (*Brachman v. Hyman,* 298 Mich. 344). See paragraphs 31 to 33 of the Bill (R. 280) admitted by motion to dismiss. And see their admission in the Trustee's Answer to the petition for rehearing.

The Petition for rehearing was mainly based on the premise that the remainderman Cleveland should not be compelled to pay all the trustee's attorneys' fees in a case started by the Trustee by an amended bill in March, 1935, (three years before the life tenant died) in which the Trustee admitted losing $150,000 of the legacy. Remainderman Cleveland contended that under *Davidson v. Young* (290 Mich. 266) she, as defendant, was entitled to demand that the Trustee justify the admitted losses—and that she should not be penalized by heavy attorneys' fee allowances—if when the case was tried heavy losses were admitted—

The petition for rehearing asserted to the Court of Appeals that Trustee's counsel on oral arguments stated positively to that Court that:

> "* * * as ground for affirmance of the lower court's said findings and judgment that:
>
> (a) The appellant Cleveland's one-sixth interest in the capital stock of C. K. Eddy and Sons, left her in trust under the Ninth Paragraph of the last will of Arthur D. Eddy, Deceased (R. 8, 10) and

appraised at his death in April, 1925, at the net value of $616,000.

was then—on said final hearing of February 4, 1941—worth as much or more than it was in said April, 1925, namely, $616,000 * * *."

The Trustee's answer to this Petition stated:

"On page 3 of appellant Cleveland's petition for rehearing is found the statement that the trustee bank always admitted large losses to appellant Cleveland's one-sixth interest. This is not so. It has been the position of the trustee bank that the shares of stock in its hands are of greater value than the value in 1925, when Mr. Eddy died. * * *" (Bill, R. 287).

The Cleveland Bill sets up that these statements of fact as to value were false—and knowingly made and led to affirmance by the Court of Appeals—See Cleveland Bill, paragraphs 31, 32, 33, R. 280 to 288.

The Trustee can not be heard to say that it did not intend the Court of Appeals to act upon its statements of value—and cannot claim that the Court did not act upon them—otherwise why an affirmance without opinion?

"* * * The law presumes every man to intend the natural consequences of his acts. No one can be permitted to say in respect to his own statements upon a material matter that he did not expect to be believed; * * *."

Claflin v. Insurance Company, 110 U. S. 81, 95.

2nd—The bill of complaint also charges collusion between the two Trustees.

A. The Bill charged in (Record 280) paragraphs 31, 32 and 50 (admitted by the trustee's motion to dismiss) that—

(1) The Testamentary Trustee (Second National Bank and Trust Company of Saginaw) whose duty it was to pay $180,000 of unpaid income to the life tenant Doebler—and

(2) The Mercantile Trust Company of Baltimore —(the Trustee under Mrs. Doebler's deed of trust of December 24, 1925) whose duty it was to collect this unpaid income for Mrs. Doebler's estate, had both conspired and colluded secretly to defraud their *cestui que* trusts—and defeat their actions to recover from the Testamentary Trustee, and

B. That this conspiracy and collusion only became known to plaintiff Cleveland after the (1) filing by Mercantile Trust Company in the Supreme Court of the United States of its brief in opposition to writ of certiorari asked by Mrs. Doebler's ancillary administrator in Michigan, Howell Van Auken, and (2) in the last year (since the Federal Judgment was finally affirmed) by the filing by both these trustees of their claims for attorneys' fees—which showed their collusive conspiracy to work together to defeat recovery of (a) the $180,000 of income due Mrs. Doebler's Estate, and also of (b) Mrs. Cleveland's losses of $150,000 in her one-sixth legacy.

C. The Bill also charged that this conspiracy was accomplished in this way:

(a) The Mercantile Trust Company intervened before the Federal Court, August 30, 1938, for the sworn purpose of:

"III. That the said Lila Eddy Doebler died on the tenth day of May, 1938, a resident of Baltimore City, Maryland, and a citizen of that State, without having exercised the power of revocation reserved to her in the aforesaid Deed of Trust; your

petitioner is therefore entitled to demand, to sue for and to receive any and all income to which the said Lila Eddy Doebler, deceased, was entitled under the Will of Arthur D. Eddy, deceased, from the date of the execution of said Deed on December 24, 1925, until the date of her death on May 10, 1938."

See the petition of intervention attached as Exhibit A at page 135 of the Federal Record.

(b) To sustain this recovery of $180,000 of income—it was necessary that the Federal Court accountings be made on the theory—and judgment be entered on the ground that (a) the corpus of the two trusts (under Mr. Eddy's will) was the valuable two-thirds of the net $3,700,000 of assets of the family company, and (b) not just two-thirds of the small par value family company capital stock amounting to a par of $83,000. This valuable corpus was exactly the basis and requirement of the Federal Court's accounting order of April 11, 1936, which provided:

"2. The corpus of the estate of Arthur D. Eddy, deceased, consists of all of the property and assets of the corporation of C. K. Eddy and Sons as of the date of the death of the testator, and the value of the corpus of his estate is the net worth of said corporation, less all debts due by the estate, as of the date of the death of the testator."

See Cleveland Bill, paragraph 18, Record, page 273, and

D. The bill of complaint also charged that:

(1) The audits made by the Testamentary Trustee, under this order of April 11, 1936, showed without any dispute that the Testamentary Trustee at Saginaw had not paid $180,000 of income due to Mrs.

Doebler in the years 1925 to 1938—that being the sum the directors of the Eddy family company (appointed by the Testamentary Trustee) had not declared as formal dividends to her—but had used improperly in part to pay losses in the corpus of the trusts, and

(2) That throughout the entire hearing in the Federal Court, the Mercantile Trust Company remained silent and its attorney, Mr. Besimer, made no effort to support the claim for payment of $180,000 to Mrs. Doebler—whom his client, Mercantile Trust Company claimed to represent—and also claimed her ancillary administrator Van Auken had no legal right to represent in this matter of recovery of income, and

(3) That no party ever claimed in the Federal hearing that the corpus of the two trusts was not the valuable assets of the family company—and never claimed the corpus was only the small par value shares.

This last position was the Testamentary Trustee's (Second National Bank and Trust Company) position in its original bill filed in the Saginaw Circuit Court in Chancery in June, 1934, and after removal to the Federal Court—, was completely abandoned by the Trustee's amended bill filed in March, 1935.

See Prayers D, F, G and H (Cleveland bill, paragraph 47, R. 298) which are essentially Probate Accounting prayers based on the position and specific allegations of the Trustee's amended bill—that the corpus of the trusts was the valuable assets of the family company.

(4) The Bill also charged that after all the proofs were in, based on this theory of the accounting order

of April 11, 1936, that the corpus of the trusts was the valuable assets of the family company—

the Federal Court suddenly held that the corpus of the trusts, was the small par value shares. Of course, that holding automatically (a) stopped any recovery of the undisturbed income of $180,000 to Mrs. Doebler's Estate—since the dummy directors had not declared this in the years of 1925 to 1938—and the Federal Court held this directors' action was not intended as a fraud, and (b) stopped any recovery by Mrs. Cleveland of her losses (as shown by the audits of June 30, 1938) of $125,000 in her one-sixth of the assets of the Eddy company—because as the Federal Judgment argued the Trustee had not lost any of the small $10 par value shares of the family company.

Under such plain, admitted facts—it is respectfully suggested to this Honorable Court:

(a) That when the Mercantile Trust Company of Baltimore entered the Federal Court case in August, 1938, upon a petition claiming (1) $180,000 was due Mrs. Doebler's estate and (2) that it, as Trustee under the deed of trust of December, 1925, was entitled to collect this income, that such Trustee's subsequent collusive connivance with the Testamentary Trustee to defeat such recovery is good ground for full inquiry by a Court of Equity, and for the granting of suitable relief on final hearing, if the charges are sustained.

(b) Direct Attack—

The Michigan Court has approved the procedure of the Cleveland Bill—which is a direct attack on the Federal Judgment for want of jurisdiction and fraud.

See—

Reves v. Hillmer, 256 Mich. 239.
Grahl v. Malkemus, 240 Mich. 387.
Raniak v. Pokorney, 198 Mich. 567.

The Court's decision in the Grahl case, is also authority that a fiduciary's false statements of value are a fraud on the Court, as well as on the *cestui que* trust.

APPENDIX B

Discussion of Supreme Court of Michigan's Opinion Filed February 23rd, 1943.

A. No Equity Court in Michigan has any power or jurisdiction over or respecting an Estate of a Decedent, or his Will, or his Estate's Administration—

> unless the remedies of the Probate Court, which admitted the will to Probate, are "inadequate."

All Courts in Michigan and in the Sixth Judicial Circuit of the United States apply this rule—see

> *Brooks v. Hargrave,* 179 Mich. 136.
> *Tussing v. Trust Co.,* 34 Fed. (2d) 312 (District Court of Michigan).
> *Gillespie v. Schram,* 108 Fed. (2d) 39 (6 C. C. A.).

No showing by the Testamentary Trustee, and no Finding by the Supreme Court of Michigan has determined or pointed out that the Saginaw Probate Court, which admitted Mr. Eddy's will to probate and appointed the Testamentary Trustee, did not have full, adequate and complete power and remedies to enter the same judgment as that entered by the Federal Court.

That being so—no jurisdiction of the subject matter existed in the Federal Equity Court.

The recent case of *Svitojus v. Kurant,* 293 Mich. 291, recognized that a Federal Equity Court had no power whatever to decide whether a Testamentary Trustee had lost trust estate assets of an estate in course of Probate in Michigan—following Federal Judge Raymond's dismissal of the Federal Chancery proceedings in which he recog-

nized his Federal District Court, Western District of Michigan, had no power to decide a Testamentary Trustee's negligence in handling the trust assets.

B. The Trustee's amended bill in the Federal Court tendered no issue or question (under the Ninth paragraph of the Will) that the Saginaw Probate Court did not have complete and "adequate remedies" to decide.

The Amended Bill, and not the original bill, decides the question of jurisdiction or lack of jurisdiction.

See—

Journal, etc. Co. v. United States, 254 U. S. 581, 584.

Grubbs v. Smith, 86 Fed. (2d) 275 (6 C. C. A.), Cert. denied 300 U. S. 658.

The Supreme Court of Michigan failed to recognize that the Trustee Bank itself had the Federal Court enter the accounting order of April 11, 1936 (see bill of complaint Record page 273) requiring the Trustee to account for the handling, as testamentary trustee, of the assets of the Family Corporation—and the Trustee Bank—tried the entire *case on that theory.*

No room was left by the amended bill—and the *Trustee Bank's conduct of the case*—for any construction of the will.

It was admitted by all parties that the corpus of the trusts was the assets of the family company and the entire case by and under plaintiff's amended bill was tried upon that theory—*and nothing was left to the Court to construe.*

It also failed to apply the Rule that no testamentary trustee in Michigan has any right to obtain counsel or

other expenses from any court other than the Probate Court that appoints such trustee.

This is so by positive Statute—

Michigan Statutes Ann., Sec. 27.3178 (285) and
Re Grover's Estate, 233 Mich. 467, 476,
Re Horn's Estate, 285 Mich. 145.

And is so by General Law all over the United States—

Taylor v. Sternberg, 293 U. S. 470.

C. The Supreme Court of Michigan in its opinion makes reference to a few matters upon which other facts, merely in the interest of fairness, should be considered:

(1) In its opinion, the Michigan Court mentioned certain fraud "charges" made in a separate Federal District Court opinion and judgment (not here involved) by Mrs. Cleveland's mother's administrator, Howell Van Auken.

There it was charged that the late Arthur D. Eddy of Saginaw defrauded his sister, Mrs. Doebler, in the year 1920 in the following manner:

(a) Mrs. Doebler and Arthur Eddy (sister and brother) were sole heirs of their brother, Walter Eddy, who died intestate in 1918.

(b) Mr. Arthur Eddy was his brother's administrator and he filed a sworn appraisal and inventory in his brother's estate, setting forth his brother Walter's interest in the family corporation (C. K. Eddy and Sons) as worth $1,400,000. Of course, Mrs. Doebler was entitled to one-half as an equal heir.

(c) Arthur Eddy settled with his sister, Mrs. Doebler, on that basis and she sold her one-half in-

terest to her brother Arthur, in her brother Walter's estate, by a contract dated in March, 1920 and attached to which, as an exhibit, was this inventory and appraisal showing the brother Walter's interest to be worth $1,400,000.

(d) In 1938, after the death of Mrs. Doebler in Baltimore, Maryland in May, 1938, an audit was made by Mrs. Cleveland of the books of the family company (C. K. Eddy and Sons) and it was discovered that a secret set of books of C. K. Eddy and Sons existed—that showed Walter Eddy's interest in the family company in March, 1920 (after his death) were actually worth upwards of $2,600,000 instead of $1,400,000.

These books showed also that the entire net assets of C. K. Eddy and Sons were actually worth in March, 1920, at least $4,411,000 instead of about $2,600,000—which was the basis of the false inventory and appraisal filed in the brother Walter's Estate by Arthur Eddy, as his Administrator. And which inventory and appraisal was attached to the sale contract of March, 1920, as an Exhibit.

(e) However, during this audit in 1938, the original income tax return papers of C. K. Eddy and Sons made in the years 1918, 1919 and 1920 to the Federal Government by Arthur Eddy (as President of C. K. Eddy and Sons) were found.

These sworn returns gave the actual net value of C. K. Eddy and Sons as $4,411,000 in 1918.

But the District Judge held nevertheless that Mrs. Doebler probably knew in March, 1920, that the inventory and appraised value of her brother Walter's Estate of $1,400,000 was false—although no reason

was suggested why a sister would sit by knowingly and sign a sales agreement based on one-half of actual value—if she knew about such falsity.

(f) In view of that fraud, Mrs. Cleveland was entitled to such protection as she could get, when the Testamentary Trustee filed in the first suit a bill against her (a resident of California) in 1934 asking a judgment that her one-sixth corpus interest under Mr. Eddy's will (valued at $616,000 in 1925) be held to be a "par value" of $20,833.

(2) The Michigan Supreme Court in its opinion says that (when the Mercantile Trust Company filed a brief in the Supreme Court of the United States) there was "no fraud in its filing a brief in the United States Supreme Court."

No doubt, however, the Michigan Court had forgotten that this Mercantile Trust Company had intervened (indeed forced its way) in the Federal Court case on a sworn petition that it was its duty as a trustee (under the Deed of Trust of December 24th, 1925) to collect the sum of over $140,000 still unpaid by the testamentary trustee, as income due the life tenant, Mrs. Doebler, in the years 1925 to 1938 at her death.

Now—for this Mercantile Trust Company to afterwards conspire and collude (and so admitted by the motion to dismiss) with the Testamentary Trustee, which owed this money to the life tenant, to defeat a judgment for payment of such money by the Testamentary Trustee, seems to any fair mind to be a fraud, which should be fully investigated by a Court of Equity in open court on final hearing.

(3) The Michigan Supreme Court also states in its opinion that the false statement of the present full value of Mrs. Cleveland's one-sixth interest, made to the Court of Appeals by the Trustee's Counsel, could not have misled the Court of Appeals because the record before the Court showed such statement of value by the Trustees' Counsel was false.

But the Court must have forgotten that the record before the Court of Appeals only showed an admitted loss of $125,000 in Mrs. Cleveland's one-sixth interest as of May, 1938, when the life tenant, her mother, died.

The false statement of Trustee's counsel was made in February, 1941, nearly three years afterwards—and was to the effect that during these three years, which had passed since the audits were made in 1938 (showing such losses), the values had so improved that no losses then (in February, 1941, on the arguments before the Court of Appeals) existed.

The Trustee's motion to dismiss admitted such statements of value were false, and the Trustee's Answer to Mrs. Cleveland's petition for rehearing also admitted the making of such false statements.

The Court of Appeals must have denied the rehearing, believing the truth of the now admitted false statements of value. Otherwise why were such statements made by the Trustees' Counsel to the Court of Appeals at all?